United States Court of Appeals

for the Second Circuit

RESPONSES TO PETITION FOR REHEARING

74-1220

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1220

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT ALOI, JOHN DIOGUARDI,
RALPH LOMBARDO and JOHN SAVINO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER FOR THE UNITED STATES OF AMERICA TO POINT I OF THE PETITION FOR REHEARING AND REHEARING EN BANC OF APPELLANT VINCENT ALOI

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

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Preliminary Statement

Judgments of conviction were entered as to Vincent Aloi, John Dioguardi, Ralph Lombardo, and John Savino on February 5, 1974, in the United States District Court for the Southern District of New York after an eight week trial before the Honorable Whitman Knapp, United States District Judge and a jury.*

On January 31, 1975 this Court (Moore and Feinberg, *CJJ.* and Palmieri, *D.J.*) rendered its decision affirming the judgments of conviction as to Vincent Aloi, John

* For a complete statement as to the charges in the indictment, the jury's verdict and the sentences imposed by Judge Knapp see the Preliminary Statement in the Government's brief on appeal.

Dioguardi and Ralph Lombardo and reversing the judgment of conviction as to John Savino. *United States* v. *Aloi,* 511 F.2d 585 (2d Cir. 1975).

On February 28, 1975, Vincent Aloi and Ralph Lombardo filed petitions for rehearing and rehearing en banc. On May 23, 1975 this Court ordered the government to file an answer to Point I contained in the petition for rehearing and rehearing en banc of appellant Vincent Aloi which is also incorporated by reference in the petition for rehearing and rehearing en banc filed by appellant Ralph Lombardo. In Point I Aloi argues that his conviction on Count 18, the use of a false offering circular in connection with the sale of securities, must be reversed because the District Court failed to charge as to this count the essential element of "willfulness."

Statement of Facts

The evidence at trial with regard to the conspiracy to sell stock in At Your Service Leasing Corp., ("AYSL") and the roles therein of Vincent Aloi, John Dioguardi and Ralph Lombardo is set out in the opinion of this Court at pages 589-591. Count 18 charged the use of a false offering circular in connection with the sale of AYSL securities in violation of Title 15, United States Code, Sections 77s, 77x and 17 C.F.R., Section 230.256 and Title 18, United States Code, Section 2. The convictions on Count 18 are discussed at page 599-600 of the Court's opinion.

The essential facts concerning Count 18 are the following. The offering circular for the 1970 public offering of AYSL stock was prepared by Andrew Nelson, a financial consultant who had been hired to assist in taking AYSL public, with the assistance of Gerald Miller, a lawyer and associate of Nelson's and the four accountants who,

with Edmund Graifer, were the principals of AYSL (GX 4; Tr. 2700-2705). The offering circular was filed with the S.E.C., as required by law, prior to April 8, 1970, the effective date of the offering, and remained on file without amendment during the period of the offering and thereafter, when the stock continued to be marketed illegally. 17 C.F.R. § 230-256(e) provides: "In no event shall an offering circular be used which is false or misleading in light of the circumstances then existing." As was pointed out in the Court's opinion at page 600, the circumstances existing after Michael Hellerman entered the scheme, and the $45,000 payment from the proceeds was to be paid to the conspirators, "bore no relationship whatever to the circumstances existing on April 8, 1970." Thus the Court found, the use of the offering circular without amendment after Vincent Aloi, Dioguardi and Lombardo had joined the conspiracy was false and misleading as to the circumstances then existing.

Charge of the Court

The charge began with a review of general principles of law concerning the function of the jury and the Court, the assessment of the credibility of witnesses, the role of an indictment, the limited purpose of certain evidence, the privilege of a defendant not to testify, reasonable doubt and presumption of innocence and a review of the government's claims as to the facts. Then Judge Knapp turned to the specific charges and defined conspiracy as follows:

> "The first count of the indictment charges conspiracy. The crime of conspiracy is defined in the statutes of the United States substantially as follows.
>
> If two or more persons conspire to commit any offense against the United States and one or more of such persons does any act to effect the object of the conspiracy, each shall be guilty of a crime.
>
> That is very simple. Let me repeat it.

If two or more persons, any two, conspire to commit an offense against the United States and one or more of such persons does an act to effect the object of the conspiracy, each shall be guilty of the crime.

You will readily see there are three elements of that crime. First, there has to be a conspiracy. Secondly, the object of the conspiracy has to be to commit an offense against the United States and, thirdly, one or more of the conspirators has to do something to effect such unlawful objective.

What is a conspiracy? A conspiracy in ordinary layman's language is no more or less than a common understanding entered into between two or more persons to achieve an unlawful objective.

We are always in our daily lives watching people engaged in common undertakings. However, we only call such a common undertaking a conspiracy if its objective is an unlawful one.

Your first task is to determine whether these four defendants or any of them engaged with each other or with any other person in a common undertaking to achieve the unlawful purpose described in the indictment.

A conspiracy obviously does not have to be reduced to writing and does not have to have any particular formality attached to it. It is, as I have said, simply a common undertaking. Indeed, all conspirators, don't necessarily have to have talked to each other or know of each other's existence. What is necessary, however, is that they know of the existence of the common undertaking, are aware of its unlawful purpose and intend to further that particular unlawful purpose.

You can't stumble into a conspiracy by mistake. A person can't be guilty of a conspiracy just because he associates with others who happen to be so guilty. He can be guilty of conspiracy only if he knows a common undertaking is underfoot, if he knows that such a common undertaking has a particular unlawful purpose and if he wilfully and intentionally decides to join in the undertaking for the purpose of furthering that particular unlawful purpose.

However, if he once makes that decision and undertakes to further that unlawful purpose, his motives for doing so are immaterial.

They may be for financial gain, for filial affection or to promote the interest of his associates. Financial gain or lack of it, of course, may be considered by you on the likelihood of a given person's entering a conspiracy but whether or not such gain exists, is of no consequence if you should decide that a given person had in fact entered a conspiracy.

Of course, once a person is found to have entered the conspiracy, it is immaterial whether or not he accomplished his purpose in doing so.

So, the first question that confronts you is, whether these defendants or any of them consciously and intentionally became parties to a common enterprise to accomplish an unlawful objective, the unlawful objective set forth in the indictment.

What then are the unlawful objectives?

They are claimed to be threefold. The two principal ones being violation of the securities laws of the United States and of its mail fraud statutes.

I'll have more to say about those statutes later but I advise you as a matter of law that the objectives of this conspiracy as described by the govern-

ment, namely, obtaining moneys from the public by fraudulently pumping worthless securities into the ordinary channels of commerce could not be accomplished without violating the above mentioned statutes and you would be entitled to conclude that any defendant whom you find to have intended such objectives, must have contemplated the violation of those statutes.

The next thing you must find is that some conspirator, not necessarily any of the defendants, committed an overt act, did something concrete in the conspiracy.

The law says it is no crime just to stand around and plan. You have to do something in furtherance of the plan. It may not be particularly significant, but it has to be something.

This indictment sets forth a wide variety of overt acts. I shall not trouble to read them to you. You may call for the indictment or read it yourself if you want to. Suffice it to say you must find that someone performed at least one of the overt acts set forth in the indictment.

I will also advise you that these so-called substantive offenses which I will discuss with you shortly are also listed as overt acts in the indictment, so if you find that any of the acts so listed have been performed, performed by one of the conspirators, such finding can meet the requirement of an overt act for the purpose of the conspiracy.

Your first task then is to decide whether these defendants or any of them are guilty of conspiracy under the rules as I have laid them down" (Tr. 5489-5493).

Judge Knapp then advised the jury that he was submitting the case on the theory that no defendant could be con-

victed of a substantive count unless he had first been found guilty of conspiracy.

> "If you find that one or more of them are not so guilty, or that there is a reasonable doubt on that subject, your task is finished as to such defendant or defendants, because under the theory I am submitting this case to you, no defendant can be convicted of a so-called substantive offense unless he has first been found guilty of conspiracy.
>
> What then is the theory to which I have just referred? It is a principle of law that where two or more persons join in a conspiracy to achieve an unlawful purpose, all of them become guilty of any criminal act performed in the furtherance of that conspiracy, whether or not any of them individually had anything to do with that particular unlawful act or even knew of its existence.
>
> Let me say that again.
>
> If two or more people confederated together to accomplish an unlawful purpose, they become in the eyes of the law partners in crime and just as in any other partnership, each partner is responsible for the agreed objectives of the partnership" (Tr. 5493-5494).

Next, the Judge turned to the substantive counts:

> "With that background, let's look at the so-called substantive crimes alleged in this indictment.
>
> I am not going to discuss these individual crimes in the order that they are listed in the indictment or even in chronological order, but rather in the order that seems to me most conducive to clarity of presentation to you.
>
> The first substantive act I am going to discuss with you is alleged in the last count of the indictment, namely count 18.

Count 18 charges in effect that this printed prospectus or brochure about which you heard so much, namely Exhibit * was false and misleading in that it failed to disclose several material facts including among others, that Hellerman was involved in the deal and that some $45,000 would be siphoned off to the five defendants originally on trial before you.

I needn't trouble you with reciting the other omissions which you have already heard about.

I advise you as a matter of law, if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of that prospectus would have violated the securities laws of the United States.

I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation (sic) of the conspirators, you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in count 18 of the indictment" (Tr. 5494-5495).

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* Exhibit 4.

Defendants Failure to Object to the Charge

1. Failure to object after having been shown a copy of similar charge in advance of trial.

On December 10, 1973 eleven days before the charge was given, Judge Knapp, in a conference with counsel in his robing room before trial began in the morning, handed out to defense counsel a copy of his charge in the *Soldano* case.* Prior to giving a copy of the charge to defense counsel he stated:

> "The Court: I assume you have seen the Government's requests to charge?
>
> * * * * *
>
> The Court: In general I agree with what they say is the law and I will go over later how I propose to do it. I don't in general conduct seminars. I don't believe, for example, that I ever tell a jury why a law is passed. It is none of their business. I don't define laws to them. The Government is aware of what I did in Soldano on the substantive crimes and I will give you a copy and ask you to pass around my Soldano charge on the substantive charge. This is not to take exception what I have done in Soldano. It is to give you the gist of how I handled it and if you have other thoughts how it ought to be handled, I would hear it. You are not stuck with what I did on Soldano and you are free to except to it.
>
> In brief, I take the responsibility to tell the jury what the facts they have to find in the felony counts, only felony counts. I don't tell them why the law was passed or the terms of the law. I tell them if

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* *United States* v. *Soldano*, et al., 71 Cr. 558, affirmed without opinion sub nom. *United States* v. *Greenberg*, Dkt. No. 72-2368 (2d Cir. 1973).

you find these facts, you are to find guilty. If you don't, he is not.

That case was affirmed from the bench but that doesn't make it authority because each of the defense counsel specifically agreed to that method of proceeding after it was over so the Court of Appeals might have thought it was the most horrendous thing they ever heard of" (Tr. 3655-3656).

The portion of the *Soldano* charge pertaining to conspiracy and the substantive counts delivered to defense counsel is almost identical to the charge subsequently given by Judge Knapp in the *Aloi* case. Specifically there is no instruction that the jury must find that the person actually committing the substantive act had to have done so willfully. In *Soldano* Judge Knapp charged:

"The first charge is conspiracy. I am not much in favor of reading statutes to jurors, but the crime of conspiracy is rather simply described in the statute as follows:

If two or more persons conspire to commit any offense against the United States and one or more of such persons does any act to effect the objective of the conspiracy, each shall be guilty of the crime of conspiracy. That is very simple.

Let me repeat it.

If two or more persons, any two, conspire to commit any offense against the United States and one or more of such persons does an act to effect the objective of the conspiracy, each shall be guilty of the crime of conspiracy.

You will note a slight difference in the definition I just read to you than the one I read in the beginning. In the beginning I told you that in order to consider anything further with respect to these defen-

dants, you would have to find that they were guilty of a conspiracy or participants in a conspiracy, the object of which was to perpetrate a fraud.

If this were a State Court, that is all you would have to find. In the Federal Court you have to go further and find that the fraud which the defendants perpetrated, if you find that they did or any of them did, constituted a violation of some statute of the United States. We don't have general crimes in this court, we have to find a statute of the United States.

As to that I charge you as a matter of law that if you find that it was in the reasonable contemplation of the conspiracy that the United States mails would be used in the perpetration of that fraud, if you find there to have been a conspiracy or fraud, then that requirement of Federal jurisdiction has been met.

Obviously, the United States Government has an interest in seeing to it that its mails aren't used in the course of frauds against the public, and the statutes properly reflect that interest.

Going back to what you must find. You must find that there existed a conspiracy and that the purpose of that conspiracy was to perpetrate a fraud, in that the mails were used or the use of the mails was within the reasonable contemplation of the parties, and I will describe reasonable contemplation later" (Tr. 1393-1395).

* * * * *

"As I told you at the outset, the basic question in this case is whether or not the defendants or any of them were willing and wilful participants in the conspiracy that has been alleged providing, of course, you find that conspiracy in fact existed.

If you find that there was such a conspiracy and that any defendant was a willing member thereof—no, I am starting off wrong. If you fail to find that there was such a conspiracy or fail to find that any particular defendant was a member thereof, or have a reasonable doubt on either of those subjects as to any particular defendant then that is the end of your labors with respect to that particular defendant.

He is entitled to an acquittal on all counts in this indictment.

However, as to any defendant, if you find that conspiracy exists, as to any defendant whom you find guilty of the conspiracy count under the rules I have described to you, you should then proceed to consider whether or not such defendant is guilty of any of the other counts contained in this indictment and I shall now proceed to discuss those other counts with you" (Tr. 1408-1409).

* * * * *

"Now the Government has charged several individual crimes, that several individual crimes were committed in pursuance of this conspiracy. Now I will take them up one by one.

The first of those is count No. 3, and that is charged only against the defendant Soldano" (Tr. 1410).

* * * * *

Count 3 alleges or refers to the transaction—the basic charge in count 3 is that in pursuance of the conspiracy a confirmation for the sale of 2000 shares of Belmont stock addressed to one Dr. Raya Atlas was placed in the United States mail.

You will remember the testimony of the witness Pasternack that under the instructions from the co-conspirator Drykerman, he sold 2000 shares of

Belmont to the firm of Byer & Lowe and mailed the confirmation to Dr. Raya Atlas" (Tr. 1410-1411).

* * * * *

"Now if you believe that it's been established beyond a reasonable doubt that the sale to Byer & Lowe was procured by the conspirators in furtherance of the conspiracy, and that the conspiracy constituted a scheme to defraud the public, and that the defendant Soldano was at that time a member of the conspiracy then I advise you as a matter of law that you may find the defendant guilty under count No. 3.

Count No. 3 in substance, it is a crime to use the mail for this purpose that I have described. It is a federal crime. If you find that the transaction to which this confirmation relates was a transaction in the furtherance of the conspiracy, it becomes a federal crime to use the mail in any relationship with that transaction and mailing the confirmation slip is a realtion to the transaction, and guilt can be made out if you believe those facts.

And I will tell you about intending to use the mail as it relates to all of these counts afterwards" (Tr. 1412).

* * * * *

As to (Count 4) I advise you as a matter of law if you are satisfied beyond a reasonable doubt that the conspiracy existed on March 4th, 1970, that the defendants Soldano and Greenberg were members of the conspiracy on that day, the purpose of the conspiracy constituted a scheme to defraud the public and that the sales were procured in furtherance of that conspiracy and that the confirmations, Exhibits 23, 24 and 25, were mailed to Mr. Wilshire as an intended consequence of that sale you may find the defendants or either of them as to whom

you make these findings beyond a reasonable doubt, guilty of the crime charged in count 4" (Tr. 1413).

* * * * *

"The transaction referred to in (Count 11) is the one on which at the time indicated co-conspirator Bruce Halpern is alleged to have purchased from First William Securities 2500 shares of Belmont stock and mailed the confirmation, Exhibit 22, to Lilian Wilshinsky in Schenectady, New York.

I might advise you as a matter of law that if you are satisfied beyond a reasonable doubt that that transaction occurred, that the conspiracy existed on the date indicated, that the conspiracy constituted a scheme to defraud the public and that Soldano was a member of it on that day, and that the transaction was conducted in furtherance of the conspiracy you may convict the defendant Soldano of the crime charged in count 11" (Tr. 1414).

* * * * *

"As to (Count 15) I charge you as a matter of law if you accept, are satisfied that the transaction happened as described; everytime I say satisfied, I mean beyond a reasonable doubt, and that the conspiracy existed on the date indicated, that its purpose was to perpetrate the fraud that I have described and that the defendants Soldano and Greenberg were members of it on that date, and that the co-conspirators Hellerman and Schoengold were acting in furtherance of the conspiracy in executing that transaction, you may convict the defendants Greenberg and Soldano of the crime charged in Count 15" (Tr. 1414-1415).

* * * * *

"The final count is No. 37 and refers to the sale by J.M. Kelsey to Barad-Shaff Securities of 100 shares of Belmont stock on April 27th, 1970, and the consequent mailing of Exhibit 17, the confirma-

tion slip—74, the confirmation slip to Taffs Foods, Inc. care of Fred Nathan (Tr. 1416).

* * * * *

"I advise you, as a matter of law, that if you are satisfied beyond a reasonable doubt that the conspiracy alleged in this indictment existed on that day that each of the defendants were members of the conspiracy on that day and the conspiracy constituted a scheme to defraud purchasers of common stock of Belmont and obtain money and property from such persons by means of false and fraudulent intentions, and that the purchase of these particular shares by Barad-Shaff from Kelsey was in furtherance of that conspiracy and that the mailing of the confirmation to Taffs Foods, Inc. was an intended consequence of that transaction, you may find that the defendants or any of them as to whom you make these findings beyond a reasonable doubt guilty of the transactions charged in count 37" (Tr. 1416-1417).

* * * * *

"I have used several times in this charge the word "intended consequences." With respect to the use of the mails. That doesn't mean that the conspirators or any of them had to sit down and discuss among themselves the mails were going to be used or even that they were specifically aware of the fact that the mails were going to be used. All that is necessary is that the use of the mails was a natural and foreseeable consequence of their conduct" (Tr. 1417).

Defendants do not claim that any objections were made to this proposed method of charging on the substantive counts prior to the *Aloi* charge to the jury.

2. The failure to object after the charge was given to the jury.

After the *Aloi* charge was delivered to the jury, the jurors were excused and defense counsel were given the opportunity to object to Judge Knapp's charge. A number

of objections were made but none were made to the Court's charge on the substantive counts (Tr. 5502-5509).

Opinion of This Court

In its opinion, this Court considered the several arguments of the appellants concerning the charge to the jury at pages 594-595. First the Court reviewed the relevant parts of the charge: the Government's claims as to the evidence, the definition of conspiracy, and the *Pinkerton* instruction. Then the Court dealt with the alleged infirmities in the charge, that it constituted an amendment to the indictment, that it failed to include a reading of the applicable statutes to the jury, that it failed to define certain terms and failed to charge that material omissions from the offering circular had to be willful, that it was relatively short. The Court then treated appellants' contentions as follows:

> "This was a long trial; the jury had heard and seen many witnesses. At the conclusion of the trial they must have had a fairly good idea as to the issues. The summations of the four counsel for the four defendants and the government highlighted the salient contentions. The value to a jury of a four or five hour charge will undoubtedly be a subject for judicial debate for years to come. The so-called 'boiler plate' section of the charge has been built up over the generations to a highly disproportionate size by adding the omissions held to have been error by appellate courts in their decisions over the years. An attempt at brevity is now characterized as 'plain error'—a term of art tantamount to saying that a defendant has not had a fair trial.
>
> If error is 'plain' one might well ask: plain to whom? Apparently not to the experienced defense counsel during the trial. These counsel were given by the court a copy of its charge in another similar case and advised by the court that it proposed to

give a somewhat similar charge as to the substantive counts. Rule 30, F.R. Cr. P. must be given some meaning. Its purpose is obvious, namely, to give the trial judge an opportunity to remedy any defects which counsel believe may exist." *United States* v. *Aloi, supra,* 511 F.2d at 595.

In its concluding paragraph the Court again dealt with the issue of the charge and wrote:

"Conclusion:

In final analysis the question to be answered, after a review of the indictment, the appendix, the transcript and the voluminous briefs of all four appellants, is: have they had a fair trial? The indictment put them on notice as to the charges against them. For eight weeks appellants concentrated upon the lack of credibility on the part of their accusers. They did not seriously question Hellerman's stock swindle —only their connection therewith. The court's charge, although it could have defined and stressed the elements of the crimes charged in the various counts with greater specificity, adequately presented the factual issues for jury determination. For these reasons we affirm the judgments of conviction as to appellants Lombardo, Dioguardi and Vincent Aloi and reverse as to appellant Savino." *Id.* at 602-603.

ARGUMENT

The Court's failure specifically to charge that the jury must find in Count 18 that the use of the false offering circular was willful was not error, and in the context of the entire trial certainly was not plain error affecting substantial rights of the defendants.

1. The failure to charge willfulness was not error.

Aloi argues in Point I of his petition for rehearing and rehearing en banc that "willfulness" is an essential element of the offense charged in Count 18, and that failure to charge this essential element automatically is plain error requiring reversal of the convictions on that Count. As argued in the Government's brief on appeal and as found by this Court in its opinion the argument is without merit. The failure to charge specifically that the jury must find that the use of the false offering circular was willful was not error in this case and was certainly not plain error affecting substantial rights of the defendants.

As shown above in the statement of facts as to the Court's charge, the substantive counts were submitted to the jury only on a *Pinkerton* * theory. In his charge after reviewing the facts alleged in the indictment as to each substantive count, Judge Knapp instructed the jury in substance that if the jury found the acts alleged in the particular count (1) to have been done in furtherance of the conspiracy, and (2) to have been within the reasonable contemplation of the conspirators, then a defendant found guilty of conspiracy and found to be a member of the conspiracy when the alleged acts were done is also guilty of the substantive crime. A charge, as to Count 18, that a specific individual using the offering circular, had to do so willfully was not necessary, because it is well estab-

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* *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

lished that a defendant is criminally liable for the acts which he causes to be done through a wholly innocent intermediary. In such circumstances willfulness on the part of the third person is not an essential element of the crime, so long as the defendant has the requisite willfulness and criminal intent. *United States* v. *Bryan*, 483 F.2d 88, 92 (3d Cir. 1973) (en banc); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002, *reh. denied*, 386 U.S. 938 (1967); *United States* v. *Weisscredit Banca Com. E D'Invest.*, 325 F. Supp. 1384 (S.D.N.Y. 1971) (Wyatt, *J.*); *United States* v. *Barr*, 295 F. Supp. 889 (S.D.N.Y. 1969) (Weinfeld, *J.*). When, as here, a substantive count goes to the jury solely on a *Pinkerton* theory, the requisite instructions by the Court on willfulness and intent, and the jury's finding of these elements, may derive simply from the Court's charge on conspiracy and the defendant's conviction for that offense. In *Pinkerton*, Justice Douglas wrote:

> "The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all." *United States* v. *Pinkerton*, *supra*, 328 U.S. at 647.

Thus, even if the false offering circular had been "used" only by a completely innocent third party, the defendants, as members of the conspiracy which caused the use of the offering circular in a manner forbidden by law are guilty of the substantive charge, if the use was in furtherance of the conspiracy and within the reasonable contemplation of the conspirators. Under such circumstances therefore,

the Government need not prove willfulness on the part of the third party actually using the offering circular.

Even if this were not the law, the defendants' convictions could still be sustained because the AYSL offering circular was "used" by the defendants themselves, hardly innocent third parties, and by Michael Hellerman, concededly a willful conspirator. In its opinion this Court found that the circular was "used" because "having been filed with the SEC, it was a genesis of the subsequent plan to defraud, and facially at least, the existence of the filed circular lent an aura of legitimacy to the scheme." *United States* v. *Aloi, supra,* 511 F.2d at 600. When "use" is construed in this sense, the question of guilt or innocence on Count 18 depends as Judge Knapp charged on whether a particular defendant willfully participated in the conspiracy, whether the false offering circular was used in furtherance of the conspiracy and whether its use was within the reasonable contemplation of the conspirators. Judge Knapp explicitly covered the issue of willful participation in the charge to the jury by stating:

> "What is necessary is that they know of the existence of the common undertaking, are aware of its unlawful purpose and intend to further that particular unlawful purpose. You can't stumble into a conspiracy by mistake. A person can't be guilty of a conspiracy just because he associates with others who happen to be so guilty. He can be guilty of conspiracy only if he knows a common undertaking is under foot, if he knows that such a common undertaking has a particular unlawful purpose and if he wilfully and intentionally decides to join in the undertaking for the purposes of furthering that particular unlawful purpose." (Tr. 5491)

In response to a request by Aloi after the charge, the Court further elaborated:

"Now, the defendants, as usual, previous to trial submitted certain requests to me that I charge and Mr. Lewis submitted one which he thinks I didn't charge. I think I did. However, rather than have a discussion about it I will read you his particular paragraph again, which is that a mere willing participation in acts of alleged co-conspirators knowing in a general way their intent was to break the law is insufficient to establish the conspiracy.

I don't know if I used those words, but I told you quite specifically that anybody who joins a conspiracy—you can't get into a conspiracy just by being around where other conspirators are, you can't get into a conspiracy by knowing bad people. You have got to know the specific objective of that conspiracy, the specific unlawful objective.

Of course, that doesn't mean you have to know what section of the statute they violated, or anything of that nature. You have got to know the specific unlawful objective of the conspiracy and make a conscientious determination to use your efforts to carry that objective forward.

Now, one of the defense counsel got the impression that I told you that if you found the defendants guilty of the conspiracy you had to find them guilty of all the substantive counts. I am sure I didn't intend to tell you that and I don't think you got that impression.

You can't find the defendants guilty of independent counts until you find them guilty of conspiracy —until or unless you find them guilty of the conspiracy. That applies to each and every one of them.

Naturally, as I told you many times, guilt is individual.

So as to the substantive counts, before you come to the substantive counts you decide as to each de-

fendant, is he guilty of the conspiracy. If your answer to that is no, there is a reasonable doubt on the subject, that is the end as far as that defendant is concerned.

Then, if as to any or all the defendants there is a yes answer, you proceed. And remember what I said about each count. In substance it is what is reasonably in contemplation of the conspiracy. Did it happen and was it in contemplation of the particular defendant whose case you are considering?

That doesn't mean he has to contemplate the particular mailing, but he has to contemplate that that kind of unlawful activity was going to go on. If he does, then you find him guilty provided you find all the other things I told you before" (Tr. 5514-5516).

Since under these very specific instructions on the issue of willfulness the jury found all defendants guilty of a conspiracy which had as one of its charged objects use of a fraudulent offering circular,* they must have found each had the requisite intent necessary to justify conviction for the substantive offense of the "use" by the conspirators of the false offering circular. Thus, so far as these defendants are concerned, any defect in the charge by the omission of what would have been essentially a redundant instruction as to this element was cured by the jury's finding of guilt on conspiracy. *United States* v. *Baratta*, 397 F.2d 215, 225-226 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968); *United States* v. *Reid*, Dkt. No. 74-2598 (2d Cir., April 24, 1975), slip op. at 3095-96; *United States* v. *Jacobs*, 475 F.2d 270, 283-284 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973).

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* An object which the jury by its guilty verdicts on Count 18, whatever the effect of the absence of a charge on wilfullness, clearly found as to each defendant.

2. The failure to object forecloses defendants' right to appeal absent plain error.

In his petition, Aloi also argues that the failure of defense counsel to object to the charge, after having received advance notice of how the charge on the substantive counts would be framed, and after the charge was delivered to the jury, does not foreclose review on appeal under Rule 30, Federal Rules of Criminal Procedure. He further contends that the submission by the government of requests to charge on the substantive counts, in which a charge of willfulness was requested in connection with Count 18, preserves his right to appeal since he did not specifically oppose the Government's request. These arguments are meritless.

Defense counsels' efforts on appeal to negate the significance of the fact that their predecessors at trial were given a copy of the *Soldano* charge eleven days before the charge, began with their motion filed before oral argument on June 21, 1974 to strike portions of the government's brief. In this motion it was asserted that none of the defense counsel at trial recalled receiving the copy of the *Soldano* charge. It was then pointed out in the government's reply to the motion that the trial record showed that a copy of the charge had been given by Judge Knapp to defense counsel for their review (Tr. 3655-3656, 3664). Then, in Dioguardi's reply brief it was conceded that the copy of the charge had been given to defense counsel, but it was contended that the Judge in his remarks before turning over the charge and the charge itself only alerted defense counsel to the fact that he would not read the statutes, or recite why the law was passed, and would tell the jury if they found certain facts they must find guilt.

In fact, however, the charge was given to defense counsel so they could see how the Court intended to charge on the substantive counts. In this regard the approach in the *Soldano* charge was identical to the approach in the charge given in *Aloi*. The jury was told it first had to determine

whether a particular defendant was a member of the conspiracy. If he was, then he was responsible for acts done in furtherance of the conspiracy which were an intended consequence, defined as within the natural and foreseeable contemplation, of the conspirators. As in the *Aloi* charge, there was in the *Soldano* charge no instruction that the jury had to find willfulness on the part of the person who placed the confirmations in the mail. Thus the contention by Aloi that he was not alerted to exactly how the Judge would handle the charge on the substantive counts on the specific point at issue here is plainly inaccurate.*

Now in his petition for rehearing Aloi also raises for the first time the argument that the issue was preserved for appeal despite Rule 30, because a request to charge was filed by the Government. This argument is misleading, and Aloi's reliance on the cases cited in his petition ** is misplaced, because each is a case where the Court held that failure by the party now claiming error to request specific instructions and failure by that party to object to the instructions given foreclosed the right to object on appeal. Here it is not contended by defendants that they submitted a request to charge or objected to the Court's charge after it was given on this point. If they had done so the issue could have been settled by the Court at the time. Their right to appeal is not preserved because the Government filed a request to charge. Thus absent plain error affecting substantial rights appeal is barred on this issue. *United*

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* Defendants further contend that the *Soldano* charge is inapplicable to Count 18 in *Aloi*. They say the *Soldano* indictment alleged no securities fraud counts under Title 15, United States Code, § 77(x), the applicable penalty section and therefore they had no indication the Court would fail to charge willfulness. This assertion is incorrect. Counts 2 through 23 of the *Soldano* indictment charged substantive violations of securities laws under Title 15, United States Code, §§ 77q(a) and 77(x) (Counts 2-10), and §§ 78j(b) and 78ff (Counts 11-23).

** *United States* v. *Knippenberg*, 502 F.2d 1056, 1061 (7th Cir. 1974); *Chatman* v. *United States*, 411 F.2d 1139 (9th Cir. 1969); *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974).

States v. *Bynum*, 485 F.2d 490, 563 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *Goldsby* v. *United States*, 160 U.S. 70, 77 (1895); *United States* v. *Tramaglino*, 197 F.2d 928, 932 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952); *United States* v. *Pinto*, 503 F.2d 718, 723, 724 (2d Cir. 1974); *United States* v. *Chaplin*, 435 F.2d 320, 323 (2d Cir. 1970); *United States* v. *De La-Motte*, 434 F.2d 289, 294 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States* v. *Abrams*, 427 F.2d 86, 90 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); *United States* v. *Scandifia*, 390 F.2d 244, 248, 249 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969).

3. The failure to charge willfulness was not plain error.

Aloi necessarily argues in his petition that the failure of Judge Knapp specifically to charge willfulness as to the actor in Count 18 was plain error requiring reversal under Rule 52(b), Federal Rules of Criminal Procedure. Under Rule 52(b) the error to be "plain" must be one affecting "substantial rights of the defendant." It is clearly unreasonable here to suggest that, even if error, the omission from the charge of willfulness specifically as to Count 18 made any difference whatsoever to the jury or to any rights of the defendants. As set forth in this Court's opinion the existence of the misleading offering circular at the SEC was the genesis of and lent an aura of legitimacy to the offering, and thus all who joined the conspiracy including the defendants on trial "used" the circular. The jury clearly found that these defendants acted willfully because it was charged properly on the intent necessary to enter the conspiracy, which included use of the false circular, and found them each guilty of conspiracy.

Even if this were not so, the omission of an instruction on willfulness as to Count 18 was of substantially less significance than might ordinarily be the case. This is

because the defendants' guilt on Count 18 derived, under *Pinkerton*, from their membership in a conspiracy contemplating the use of a false offering circular, as to which there is no claim of defective submission to the jury. Compare *United States* v. *Dickerson*, 508 F.2d 1216 (2d Cir. 1975). Thus, at most, the omission of an instruction on willfulness in Count 18 resulted in removing from the jury's determination an element of the offense relating only to the willfulness of a third party, not of the defendants themselves. Thus, the recent cases in this Circuit where "plain" errors in the trial court's charge have resulted in reversal are each very different from the situation at hand. The most recent case is *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1974). There this Court reversed a bank robbery conviction because in a 12 page charge the trial judge devoted only ½ page to describing the offenses with which the jury was to concern itself, and failed completely to specify any of the particular elements to be proven. In distinguishing another bank robbery case, *United States* v. *Pravato*, 505 F.2d 703 (2d Cir. 1974) where the Court listed all the elements but then erroneously stated that one of these elements had been stipulated to when it had not been, this Court stated, in contrast to the situation in *Aloi*, that the jury in *Howard* was "operating almost completely in the dark." *United States* v. *Howard, supra*, 506 F.2d at 1134.

In *United States* v. *Clark*, 475 F.2d 240 (2d Cir. 1973) this Court reversed a narcotics conviction because of errors in the trial judge's charge. In *Clark*, the Court found the charge "not only failed to identfiy and accurately define the elements of the offense but . . . also gave the jurors improper and misleading instructions" as to certain general principles of law. *Id.* at 248. The Court concluded that "despite the surprising absence of objections by appellant's counsel, the trial judge's charge, viewed as a whole, is so deficient and defective in material respects as to amount to 'plain error . . . affecting substantial rights within the

meaning of Rule 52(b), F.R. Cr. P." *Id.*, at 250. Judge Knapp's charge in *Aloi* was found by this Court in its opinion to be concise and fair, and in no respect approached the inadequacy of the *Clark* charge.

In *United States* v. *Fields*, 466 F.2d 119 (2d Cir. 1972) this Court reversed a conviction involving the unlawful receipt of a stolen tractor trailer in interstate transportation and conspiracy, on the ground of plain error in the charge. In *Fields*, the trial judge's charge on what the Government had to prove as to the defendant's knowledge of whether the contents of the trailer were stolen property was incorrect. Also the Judge charged the wrong portion of the statute alleged to have been violated, and misstated the objects of the conspiracy charged in the indictment. This Court found that despite the fact that none of the errors were called to the Court's attention by defense counsel "the cumulative effect of the errors" was "plain" and "affected substantial rights." The Court then stated

> "This is not after all, a case of nit-picking over nuances in a judge's charge; the errors go directly to a defendant's right to have the jury told what crimes he is actually being tried for and what the essential elements of those crimes are." *Id.*, at 121.

The criticism levelled at Judge Knapp's charge in *Aloi*, in contrast, is nit-picking. The jury was fairly told what the crimes were that the defendants were being tried for, and if it was error to omit the element of willfulness from the charge on Count 18, such omission could not have made any difference to the jury in view of the careful instructions on willfulness elsewhere in the charge and the fact that there was no dispute over the intent of the defendants or of Michael Hellerman. See *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. dismissed as in providently granted*, 389 U.S. 80 (1967), which distinguishes *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965); *United States* v. *Private Brands*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).

CONCLUSION

The petition for rehearing and rehearing en banc should be denied.

Respectfully submitted,

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BANCROFT LITTLEFIELD, JR.,
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★ U. S. Government Printing Office 1975— 614—215—518

Form 279 - Affidavit of Service by Mail

BL:ccc

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.: 74-1220

BANCROFT LITTLEFIELD, JR. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of June, 1975 he served 2 copies of the within Answer by placing the same in properly postpaid franked envelopes addressed: Kristin Booth Glen, Esq., 30 East 42nd Street, New York, New York 10017, Attorney for Defendant-Appellant Vincent Aloi
Joel Brenner, Esq., McCarthy, Dorfman and Brenner, 1527 Franklin Avenue, Mineola, New York 11501
Gustave H. Newman, Esq., 522 Fifth Avenue, New York, New York
Attorneys for Defendant-Appellant Ralph Lombardo

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing in front of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

BANCROFT LITTLEFIELD, JR.
Assistant United States Attorney

Sworn to before me this
5th day of June, 1975

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977